

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4
5 ROBERT BROWNE,
6 Plaintiff,

7 vs.

8 DOLGEN MIDWEST, LLC, *et al.*,
9 Defendants.

2:18-cv-01504-RFB-VCF

REPORT AND RECOMMENDATION

MOTION FOR SANCTIONS [ECF No. 12], MOTION
TO DEEM ADMITTED [ECF No. 16],
COUNTERMOTION TO WITHDRAW [ECF No. 20]

11 Before the Court is Plaintiff Robert Browne's Motion for Sanctions for Spoliation of Evidence,
12 (ECF No. 12), Plaintiff's Motion to Deem Requests for Admissions Admitted (ECF No. 16), and
13 Defendant Dolgen Midwest's Countermotion to Plaintiff's Motion to Deem Request for Admissions
14 Admitted for Relief Under Fed. R. Civ. P. 36(b) (ECF No. 20). For the reasons discussed below, Plaintiff's
15 motions should be denied and Defendant's motion should be granted.

16 **BACKGROUND**

17 Plaintiff slipped and fell inside Defendant's Dollar General store in January 2016. (ECF No. 12
18 at 1). "On October 29, 2018, Plaintiff served the Defendant with requests for production of documents
19 that requested copies of any documents that reflect any maintenance and/or inspections to the floors in the
20 public areas of the subject premises that took place on the date of the subject incident" and "sweep sheets."
21 (*Id.* at 2). Defendant responded that it was "attempting to locate any documents responsive to th[ese]
22 request[s]. Defendant will supplement th[ese] response[s] if any responsive documents are located."
23 (ECF No. 12-2 at 4, 7). Defendant failed to provide further responses to either request before discovery
24 closed on February 11, 2019. (ECF No. 8; ECF No. 12 at 2). Also on October 29, 2018, Plaintiff served
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1 requests for admission on Defendant. (ECF No. 16 at 4-5). Responses were due on December 3, 2018,
2 but were not served “until at least December 5th but likely later than that as the Plaintiff did not receive
3 the responses until December 12, 2018.” (*Id.* at 6).

4 Plaintiff now asserts that, “It is believed that these documents [reflecting any maintenance and/or
5 inspections to the floors and sweep sheets] have either been destroyed or otherwise withheld for an
6 improper purpose.” (ECF No. 12 at 2). Plaintiff moves for sanctions, arguing that “a mandatory
7 presumption that the documents requested by the Plaintiff [are] adverse to Defendant Dollar General’s
8 Position is...appropriate.” (*Id.* at 4). In response to the motion for sanctions, Defendant states that it has
9 now been able to locate a store safety check report and it updated its responses to Plaintiff’s request for
10 production of documents on April 16, 2019. (ECF No. 17 at 1; ECF No. 17-1). Defendant argues that
11 “[t]his is the only document which [Defendant] has which was responsive to [Plaintiff’s] request for
12 maintenance or sweep log records,” so no spoliation has taken place. (ECF No. 17 at 3). Plaintiff did not
13 file a reply to Defendant’s response.

14 Plaintiff also moves to deem the requests for admission admitted due to Defendant’s untimely
15 response. (ECF No. 16 at 6). In response, Defendant acknowledges that its response was two days late.
16 (ECF No. 18 at 1-2). Defendant countermoves to withdraw the admissions because they would go to the
17 merits of the case and Plaintiff did not move to deem the admissions admitted until almost four months
18 after he received the discovery response. (ECF No. 20 at 3-4). Plaintiff did not file a response to
19 Defendant’s countermotion.

20 **MOTION FOR SPOLIATION SANCTIONS**

21 It does not appear that Defendant destroyed any evidence in this case. However, Defendant failed
22 to produce a document responsive to Plaintiff’s request for production of documents until after the close
23 of discovery and after a motion for summary judgement (ECF No. 11) had been filed. The Court may
24 sanction a party that “fails to obey a scheduling or other pretrial order.” Fed. R. Civ. P. 16(f).
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1 The Court finds that sanctions are not justified in this case. Defendant's untimely disclosure was
2 an oversight rather than an action intending to frustrate Plaintiff's ability to litigate the case. Defendant
3 produced many other items during discovery, including an incident report, surveillance footage, and
4 relevant policies and procedures. (ECF No. 17 at 2). Plaintiff never reached out to Defendant regarding
5 Defendant's efforts to locate other documents responsive to Plaintiff's discovery requests before filing the
6 motion for sanctions.

7 Plaintiff now has the documents he believed to be destroyed or withheld for an improper purpose.
8 Plaintiff did not file a reply after receiving these documents to indicate to the Court how the timing of the
9 documents' production impacts his case. The Court notes that discovery has closed and there is a pending
10 motion for summary judgment in this case. While Defendant's untimely disclosure may impact the
11 Court's analysis regarding whether further discovery is needed in this case, sanctioning Defendant is not
12 warranted at this time.

13 Therefore, Plaintiff's motion for sanctions (ECF No. 12) should be denied.

14 **MOTION TO DEEM ADMITTED AND COUNTERMOTION TO WITHDRAW**

15 A matter is deemed admitted if it is not responded to in a timely way. Fed. R. Civ. P. 36(a)(3).
16 "[T]he court may permit withdrawal or amendment [of an admission] if it would promote the presentation
17 of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in
18 maintaining or defending the action on the merits. Fed. R. Civ. P. 36(b). In addition, under LR 7-2(d),
19 "[t]he failure of an opposing party to file points and authorities in response to any motion...constitutes a
20 consent to the granting of the motion."

21 Because Plaintiff failed to file a response to Defendant's countermotion to withdraw its
22 admissions, Plaintiff has consented to the Court granting the countermotion. In addition, the Court finds
23 that allowing Defendant to withdraw its admissions will promote the presentation of the merits of the
24 action and will not prejudice Plaintiff. Plaintiff received the response to the requests for admission on
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1 December 12, 2018, almost two months before the close of discovery. (ECF No. 8; ECF No. 16 at 6).
2 Plaintiff did not object to the timing of the response until almost two months after the close of discovery.

3 Therefore, Plaintiff's motion to deem the admission admitted (ECF No. 16) should be denied and
4 Defendant's counter motion to withdraw (ECF No. 20) should be granted.

5 ACCORDINGLY, and for good cause shown,

6 IT IS HEREBY RECOMMENDED that Plaintiffs Motion for Sanctions for Spoliation of Evidence
7 (ECF No. 12) be DENIED.

8 IT IS FURTHER RECOMMENDED that Plaintiff's Motion to Deem Requests for Admissions
9 Admitted (ECF No. 16) be DENIED.

10 IT IS FURTHER RECOMMENDED that Defendant's Counter motion to Plaintiff's Motion to
11 Deem Request for Admissions Admitted for Relief Under Fed. R. Civ. P. 36(b) (ECF No. 20) be
12 GRANTED.

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14 DATED this 7th day of May, 2019.

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16 CAM FERENBACH
17 UNITED STATES MAGISTRATE JUDGE
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